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SUPREME COURT, U.S.

NO. 81-2101
IN THE SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1983

PENNHURST STATE SCHOOL AND HOSPITAL, et al.,

Petitioners,

v.

TERRI LEE HALDERMAN, et al.,

Respondents.

ON CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE THIRD CIRCUIT

REPLY OF HALDERMAN AND PARC RESPONDENTS TO PETITIONERS' OPPOSITION TO MOTION TO DISMISS CERTIORARI

Now that the intrusion they've complained of heretofore has been eliminated, Petitioners shift to new ground to support certiorari, that the district court entered "a mandate to create and favor community facilities over large-scale institutions." Opposition, p.2. Respondents submit that the Eleventh Amendment and comity questions raised to the mandate itself, as opposed to the originally alleged intrusions, are not worthy of certiorari.*

*The provisions of the August 28, 1983 Amendment of which petitioners complain across pages 3-6 of their Opposition are no part of the March 17, 1978 Order under review here, but originate in subsequent orders not here, some of which were never appealled by any Petitioner (like the hearing master order) and others of which were and have been decided by the Court of Appeals with no application for certiorari.

The mandate itself adopted the state's own position taken consistently by the state before, during and after trial: that Pennhurst had to be closed and the only practicable solution for its wrongs was to get its retarded residents into community living arrangements. The district court in 1978 felt it necessary to impose a detailed order specifying how, when and in what manner this remedy was to proceed, so detailed in the state's view as to improperly take away the state's discretion under the Eleventh Amendment and comity.* Now in its current order, the state having successfully transferred half of Pennhurst's residents, the district court has done exactly what the state has asked that it do: accord design, pace and timing to the control of the state.

There is no question here but that the abominable conditions of Pennhurst and the injuries they impose upon Pennhurst residents violate state law. Petitioners sought no certiorari on this question, none was granted, and the correctness of the unanimous holding below is thus conceded here. Similarly, this Court unanimously found that the injuries imposed upon one member of the class by the conditions at Pennhurst, Nicholas Romeo, violate the Fourteenth Amendment, Youngberg v. Romeo, 102 S. Ct. 2452 (1982),** and in this case no certiorari was sought on the substantiality of the underlying Fourteenth Amendment claim.

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*Improperly in the state's view at least since 1982, for the Eleventh Amendment and comity issues were not raised by Petitioners in the district court, nor in the initial hearings in the Court of Appeals, nor when the case was first here, but were raised for the first time in 1982 when the case was again before the Circuit on remand by this Court with directions to the Court of Appeals to decide the state law ground, a new argument which would have required that Court to ignore the mandate of this court.

**Nicholas Romeo, whose placement in a family scale community facility pursuant to the injunction in this case, had been scheduled by state and county officials for late summer 1982, was in fact placed on April 4, 1983, four days after he was found at Pennhurst with his back and buttocks covered with abrasions in the shape of a toilet brush.

Eleventh Amendment and comity arguments against overriding a state's will are peculiarly ill-suited for decision in a case where the mandate follows the will of the state. The mandate hwere, embodied in the March 17, 1978 and the current injunction, to remedy those conditions, was not "simply the opinion of the federal court about state law" nor was it formulated "regardless of the preferences of state officials or the extent or type of funding provided by the state legislature." Petitioners Opposition, p. 2. To the contrary, the mandate enjoined the remedy which the state itself recommended to the Court, Milliken v. Bradley 433 U.S. 267, . (1977), the remedy which state officials throughout the decade before had identified as necessary to correct the wrongs at Pennhurst and repeatedly promised to perform.*

The district court, in a finding never contested, in any phase of the appeals of this case, found:

> "all parties [including defendants] believe that Pennhurst should be closed and the residents should be educated, trained and cared for in the community."
>
> "[T]he Pennsylvania Department of Public Welfare's curent plans call for the transfer of all Pennhurst residents from the institution into the community (though perhaps temporarily into other institutions) by the early 1980s." 448 F.Supp. at 1313.

That was the state executive's submission to the court after judgment, Doc. Item No. 455, January 27, 1978; 448 F.Supp. at 1325, at trial, e.g. Testimony of Rice, the ranking state officer to testify, A862-A," Com. Def. Ex. 727; and it was the state executive's constant position for the decade before. See e.g.

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*That the state had not done so, whether because of inertia or because it judged retarded people or the injuries to them of insufficient importance to command state redress, was the reason for this litigation, not any difference between plaintiffs and the state as to what would be the remedy. Romeo has settled that these injuries are of constitutional importance.

April 12, 1973 Memorandum of Edward R. Goldman, Commissioner of Mental Retardation, Re: Proposed Expenditure of all Capital Funds for Pennhurst (Questons raised regarding the proposed total dispersal of that institution by the end of fiscal year 1974-1975." PARC Ex. 25 (A948); Statement of Secretary of Public Welfare, 12/14/72. PARC Ex. 26 (A971); The Governor's Review -- 1975, Sec. II, 'Welfare and Mental Health'. PARC Ex. 28 (A974)

Thus the state executive chose the solution adopted by the court and the state legislature had itself directed the same solution for Pennhurst -- a far cry from Petitioner's cry that this court mandate transgressed "the extent and type of funding provided by the state legislature." In 1970 by Act 256, the state legislature had appropriated $21 million for:

> "normalizing accommodations ... for approximately 900 Pennhurst patients ... to provide logical dispersal and orientation into the community for Pennhurst residents and alternatives to institutionalization for the Pennhurst waiting list population and other mentally retarded citizens of the area ... to be completed as expeditiously as possible so that the first units may be occupied not later than two years from the effective date of the Act. (235a-236a)*

(This 1970 Appropriations Act is, of course, apart from the generally applicable instructions of the legislature in the underlying 1966 state statute on retardation).

By their shift of ground Petitioners all but concede that the current injunction has eliminated the intrusions which were lately the burden of their plea here. Eleventh Amendment and

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*"As of April 25, 1977", the district court found, "only 37 Pennhurst residents had directly benefitted from this [the 1970] Act." 448 F. Supp. at 1312. As of 1977, 1230 people remained at Pennhurst.

comity arguments against overriding a state's will are peculiarly ill-suited for decision in a case where the mandate of the March 17, 1978 and the current injunction follows the will of the state. If long-established doctrines of the exercise of pendent jurisdiction pursuant to Fourteenth Amendment rights were to be altered, it would be more appropriate to address any change in a case where the issue had been litigated from the beginning in the district court rather than in a case where the issue was first raised in the 8th year to evade the mandate of this court.

For the foregoing reasons, certiorari should be dismissed as improvidently granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, THOMAS K. GILHOOL, a member of the bar of the Supreme Court of the United States, hereby certifies that I served true and correct copies of the foregoing Reply of Halderman and PARC Respondents to Petitioners' Opposition to Motion to Dismiss Certiorari upon all counsel for all parties, by United States Mail, first-class, prepaid postage by mailing same to the addresses below. I further certify that all parties required to be served have been served.

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APPENDIX A

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

TERRI LEE HALDERMAN et al.	:	CIVIL ACTION
v.	:	
PENNHURST STATE SCHOOL AND HOSPITAL et al.	:	NO. 74-1345

ORDER

FILED AUG 29 1983

AND NOW, this 29th day of August, 1983,

IT IS HEREBY ORDERED: The defendants shall submit to this Court, on or before October 1, 1983, their: (1) plans to provide community living facilities together with all services required by the retarded person's individual habilitation plan for Pennhurst plaintiff class members in the Southeast Region of Pennsylania (Bucks, Chester, Delaware, Montgomery, and Philadelphia Counties) during the period commencing July 1, 1984 and closing June 30, 1985; (2) plans to provide community living facilities together with all the services required by the retarded person's individual habilitation plan for retarded persons in the Southeast Region of Pennsylvania who are not members of the Pennhurst plaintiff class for the period commencing July 1, 1984 and closing June 30, 1985; and (3) plans to provide community living facilities together with all the services required by the retarded person's individual habilitation plan for Pennhurst plaintiff class

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members from counties outside the Southeast Region of Pennsylvania during the period commencing July 1, 1984 and closing June 30, 1985.

IT IS FURTHER ORDERED: A hearing shall be held on Monday, October 17, 1983 at 10:00 a.m. in Courtroom 10-B of this United States Courthouse, 601 Market Street, Philadelphia, concerning the aforesaid proposals, to determine whether these plans are appropriate and consistent with the injunctive relief previously ordered by this Court.

RAYMOND J. BRODERICK, J.